

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>91-10488</u>
EDDIE RHODES)	
)	
Debtor)	
_____))	
)	FILED
EDDIE RHODES)	at 5 O'clock & 56 min. P.M.
)	Date: 8-30-91
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>91-1050</u>
COMMERCIAL BANK)	
)	
First Defendant)	
)	
GRAYHAM CLAIMS AND)	
ADJUSTMENTS, INC.)	
)	
Second Defendant)	

ORDER OF ABSTENTION

Plaintiff Eddie Rhodes filed for relief under Chapter 13 of the Bankruptcy Code on March 14, 1991. Plaintiff filed this adversary proceeding against defendant Commercial Bank ("Commercial") and Grayham Claims and Adjustments, Inc. ("Grayham") on May 14, 1991. Plaintiff alleges in his complaint that on March 18, 1991, an employee of Grayham repossessed plaintiff's car from plaintiff's place of business in the presence of plaintiff's co-

workers; that the Grayham employee threatened plaintiff; that Commercial hired Grayham to conduct the repossession; that Commercial, having knowledge of plaintiff's bankruptcy, returned the vehicle on March 21, 1991; that the vehicle sustained serious damage as a result of the repossession; that certain items of

personal property were taken from the car and have not been returned; that Commercial was negligent in hiring Grayham to conduct the repossession; and that Grayham is responsible for the acts of its employee. Plaintiff seeks an award of damages against the defendants jointly and severally for the damage to the vehicle; damages for the loss of use of the vehicle for four days; damages for conversion of his property; damages for lost time from work which resulted from being without the vehicle; and punitive damages. Additionally, plaintiff seeks the return of the missing items of personal property. Plaintiff alleges the defendants' unlawful actions as "improper repossession" (paragraph 8), "negligent[] entrust[ment]" (paragraph 9, see also paragraphs 10 - 11) and "conversion" (paragraph 13). Nowhere in his complaint does plaintiff allege a violation of any provision of title 11 United States Code.

Each defendant timely filed an answer. In its answer and third defense, Commercial moved the court to dismiss the complaint for lack of subject matter jurisdiction. Specifically, Commercial contends this is not a "core" proceeding under 28 U.S.C. §157 and

that therefore, this court lacks jurisdiction to hear the matter. Grayham in its answer demands a jury trial pursuant to Bankruptcy Rule 9015¹. The jurisdictional and jury demand issues must be resolved before trial may proceed.

MEMORANDUM OF LAW

Under 28 U.S.C. §1334² there are four categories of

¹Bankruptcy Rule 9015 was abrogated effective August 1, 1987.

²28 U.S.C. §1334 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all

proceedings which the district courts (and their bankruptcy units) have jurisdiction to hear:

- (1) all cases under title 11;
- (2) all civil proceedings arising under title
- (3) all civil proceedings arising in cases under
title 11; and
- (4) all civil proceedings related to cases under
title 11

28 U.S.C. §1334(a) and (b).

Plaintiff's cause of action must fall within one of these four categories of proceedings to sustain this court's jurisdiction. Matter of Wood, 825 F.2d 90, 92 (5th Cir. 1987).

The first category, for which the district court has original and exclusive jurisdiction, see 28 U.S.C. §1334(a), relates to the original bankruptcy

cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceeding arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11, with respect to which an action-could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

petition itself, from which all other bankruptcy proceedings stem. Matter of Wood, supra, at 92. See also American Energy, Inc., 50 B.R. 175, 178 (Bankr. D.N.D. 1985). This category has no application to plaintiff's complaint.

The second and third categories establish jurisdiction in "core" proceeding under 28 U.S.C. §157(b)(2). Wood, supra, at 96-97. The phrase "arising under title 11" describes proceedings "that involve a cause of action created or determined by the statutory provision of title 11." Id. at 96. Such proceedings concern "administration of the estate . . . in the sense that no adverse

third party is involved (e.g., a dispute between the debtor and the trustee regarding a claim to exemptions)." Austin v. Tatum, et al. (In re: Donald E. Austin) Ch. 11 Case No. 85-40639 Adv. 89-4020, at 5 (Bankr. S.D. Ga. Dalis, J. December 31, 1989) [quoting 1 Collier on Bankruptcy ¶3.01(c)(iii) (L. King 15th ed. 1989)]. "Arising in" proceedings are those "that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." Wood, supra, at 97. Accord Austin, supra, at 5-6. The overriding test as to whether a proceeding is a "core proceeding" as "arising under" or "arising in" a title 11 case is whether "it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." Wood, supra, at 97.

In this case, plaintiff's complaint alleges facts which, if true, may support the following causes of action: wrongful repossession, conversion and negligent entrustment. Plaintiff's causes of action are based on state law. Under Georgia law, an action in tort for conversion or trover lies against a party who unlawfully repossesses another's property. Ford Motor Credit Company v. Milline, 224 S.E.2d 437 (Ga. App. 1976). Georgia law also recognizes a cause of action for negligent entrustment. See Saunders v. Vickers, 158 S.E.2d 324, 327 (Ga. App. 1967) and cases cited therein. This complaint does not concern administration

of

the estate because adverse third parties are involved and therefore does not "arise under" a title 11 case. Austin, supra, at 5. Plaintiff's complaint does not "arise in" a case under title 11 because it is not based on a right expressly created by title 11. Wood, supra, at 97. Plaintiff's state law rights could be enforced in a state court absent the bankruptcy. Those state law rights arise independently of plaintiff's bankruptcy and are not substantive rights provided expressly by title 11. Id. "[C]ore proceedings do not encompass separate state law actions." In re: Illinois-California Express, Inc., 50 B.R. 232, 239 (Bankr. D. Calif. 1985).³ Accord In re: Atlas Automation, Inc., 42 B.R. 246 (Bankr. E.D. Mich. 1984); In re: Morse Electric Company, 47 B.R. 234 (Bankr. N.D. Ind. 1985). Accordingly, I find plaintiff's complaint does not come within the meaning of a "core" proceeding under 28 U.S.C. §157(b)(2).

The fact that plaintiff's complaint is not a "core" proceeding, however, does not preclude jurisdiction if the complaint is otherwise "related to" the bankruptcy case. 28 U.S.C. §1334(b)(2); American Energy, supra, at 179. For plaintiff's cause of action to be "related to" the bankruptcy case, there must be some

nexus between the civil proceeding for which jurisdiction is sought and the bankruptcy proceeding. Id. The cause of action pled is "related to" the bankruptcy case under §1334(b)(2) if "the outcome of the proceeding could conceivably have an affect on the estate being administered in bankruptcy." Pacor,

³See generally Illinois-California Express, at 236-239 for an exhaustive discussion of the narrow definition that is to be given "core" proceedings in light of the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.E.2d 598 (1982) and its progeny.

Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984). (emphasis omitted). But compare American Energy, supra, at 179. The Eleventh Circuit, as well as a majority of the circuits, follows the Pacor test. Matter of Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990). Plaintiff's complaint could conceivably have an affect on the bankruptcy estate. "[I]t seems clear that cases encompassed by §1334(b) 'related proceedings' are those which (1) involved causes of action owned by the debtor that became property of the estate under section 541, and (2) concern suits between third parties which in one way or another affect the administration of the title 11 case." Austin, supra at 7 (quoting 1 Collier on Bankruptcy ¶3.01(c) (iv) (L. King 15th ed. 1989)). In Austin this court held that

to the extent the complaint alleges any cause of action that occurred after the plaintiff filed for protection under title 11, the allegations involve third parties which in one way or another affect the administration of the debtor's bankruptcy case. Plaintiff's allegations, therefore, are related to a case under title 11, but do not arise under title 11 or arise in a case under title 11.

Austin, supra, at 7. Plaintiff's post-petition cause of action involves third parties which in one way or another affect

administration of the debtor's estate. Plaintiff's cause of action satisfies the Pacor test and is therefore "related to" a case under title 11.

The district court has original but not exclusive jurisdiction to hear plaintiff's "related to" complaint pursuant 28 U.S.C. §1334. This court has jurisdiction to hear plaintiff's noncore claim related to the bankruptcy, but may not enter final judgment. American Energy, supra, at 78.⁴ Title 28 §1334(c) (1)

⁴ The bankruptcy judge's authority over non-core proceedings which are related to a case under Title 11 is restricted to hearing the case and submitting proposed findings of fact and conclusions of law to the district court who in turn enters final judgment. See section 157(c)(1). If the parties consent, however, the district court may allow the bankruptcy court to also enter final judgment in such cases.

United States Code provides that the district court may voluntarily abstain from hearing a claim arising under, arising in, or related to a case under title 11 "in the interest of justice or in the interest of comity with State courts or respect for State law"⁵ Plaintiff's conversion, wrongful repossession and negligent entrustment causes of action are state law claims which could not be brought in federal court absent §1334(b). Illinois-California

Express, supra, at 241. Plaintiff has an adequate remedy for defendants' alleged wrongful conduct in state court. Furthermore, plaintiff's state law claim is better adjudicated in state court. See id. There is a clear congressional policy to have state law claims heard in state court. In re: Castlerock Properties, 781 F.2d 159, 163 (9th Cir. 1986); 28 U.S.C. §1334(c). Moreover, in a case where all of the requirements for mandatory abstention under §1334(c)(2) are satisfied except for the requirement that an action already be commenced in state court, discretionary abstention under subsection (c)(1) is in keeping with the policy of 1334. Illinois California Express, supra, at 241. Compare In re: World Solar Corporation, 81 B.R. 603, 609-12 (Bankr. S.D. Calif. 1988) (holding a pending state action is not required for mandatory abstention under §1334(c)(2) if "such an action can be filed on a timely basis in a state court of appropriate jurisdiction."), and In re: Dakota Grain Systems, 41 B.R. 749 (Bankr. D.N.D. 1984).

Defendant Grayham has demanded a jury trial. Grayham has a constitutional right to a jury trial. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.E.2d 26 (1989); Langenkamp v. Culp, ___ U.S. ___, 111 S.Ct. 330, 112 L.E.2d 343 (1990); Stewart Hall Marketing, Inc. v. Bob Maddox Dodge, Inc. (In re: Stewart Hall Marketing, Inc.), Ch. 7 Case No. 89-10275 Adv. No. 89-1065 (Bankr. S.D. Ga. Dalis, J. Feb. 15, 1991); Macon Prestressed Concrete

American Energy, supra, at 178.

⁵Subsection (c) mandates abstention if a state law cause of action has already been commenced which could not have been commenced in federal court absent §1334 jurisdiction. 28 U.S.C. §1334(c)(2).

Company v. Duke, 46 B.R. 727 (D.M.D. Ga. 1985).

"If a jury trial has been requested but the case, although 'related', is based on state law with no independent basis or federal jurisdiction, then the bankruptcy court ought to abstain." American Energy, supra, at 181.

Considering the nature of plaintiff's complaint in light of the authorities cited, I find that it is "in the interest of justice, . . . comity with State courts [and] respect for State law," under 28 U.S.C. §1334(c)(1), to abstain from hearing plaintiff's state law causes of action.

It is therefore ORDERED that plaintiff's complaint is dismissed to allow plaintiff to refile his complaint in the appropriate state forum.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 30th day of August, 1991.